rejected this position in *Smith v. City of Jackson*, No. 03-1160, __ U.S. __. __ S. Ct. __ (03/30/2005). The fact that the Magistrate Judge cogently conceptualized sufficient issues of material fact demonstrates that the EEOC had a reasonable basis for appeal. The refusal of the EEOC to brief the appeal manifests that it did not adequately represent Dr. Vines and Dr. McGraw as Charging Parties in the EEOC.

Examining the totality of the circumstances and the general theories and jurisprudence involving the law of representation, the EEOC cannot be construed to be the Petitioners' representative for the purposes of *res judicata* and collateral estoppel. Further, Respondents are incorrect in claiming that a judgment acquired by a government agency necessarily binds individuals. This Court already has addressed the question of whether a judgment acquired by the EEOC binds individuals in *General Telephone Company of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 100 S. Ct. 1698 (1980) and determined that *res judicata* effects would not attach to EEOC judgments because of the statutory design. Although *General Telephone* involves an EEOC action under Title VII and not the ADEA, the justification for denying *res judicata* effects applies as well to the ADEA. This Court noted that under Title VII, individuals are allowed to maintain an individual action even when the EEOC files a lawsuit. Similarly, the ADEA in 29 U.S.C. § 626(c)(1) provides for individuals to file and maintain a lawsuit prior to that of the EEOC. Additionally, this Court in *Kimel*, 528 U.S. at 91-2, 120 S. Ct. at 650, explained that private plaintiffs retain their right to sue a state government under state antidiscrimination statutes. The enforcement scheme of the ADEA specifically supports the right and ability of individuals to prosecute their individual state law claims, even though they would not be able to relitigate a cause of action under the ADEA.

On page 10 of their opposition, Respondents imply that the EEOC in its predecessor case to *Victa v. Merle Norman*

Cosmetics, Inc., 19 Cal. App. 4th 454, 24 Cal. Rptr. 2d 117 (1993), only filed the action on behalf of the Charging Party for injunctive relief and not monetary damages, such that this avenue remained open for the individual Charging Party to pursue. This is patently incorrect. In *Victa*, the original Federal case by the EEOC sought backpay for the Charging Party, who was the plaintiff in the *Victa* state case. When the EEOC settled for an injunction only and agreed to a final judgment dismissing the action after a conference in chambers about the case, this constituted a final adjudication. The California state court reviewed the Federal jurisprudence and determined that no privity existed between the EEOC and the Charging Party because the interests of the EEOC and the Charging Party apparently diverged based upon the facts when the EEOC settled the case for injunctive relief only. Similarly, the factual circumstances herein demonstrate that the interests of the EEOC and Petitioners herein diverged, particularly when the EEOC refused to brief the appeal of the original U.S. District Court judgment granting summary judgment when the Magistrate Judge had issued a cogent Report and Recommendation to deny the Respondents a summary judgment. (Pet. App. herein.) The same U.S. District Court judge recognized this divergence of interests between the EEOC and Petitioners such that privity could not exist between them, and on that basis, he denied Respondents' motion for an injunction under the relitigation exception to the Anti-Injunction Act. Petitioners request that this Court grant their application for writ of certiorari to review the decision of the Fifth Circuit to grant the Respondents an injunction. The original decision by the U.S. District Court to deny the Respondents an injunction should be restored.

CONCLUSION

Based upon the jurisprudence and the facts, the petition should be granted.

Respectfully submitted,

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